



Helping You Run Your Condo or Homeowners Association Legally and Efficiently

SEPTEMBER 2016

FEATURE

You'll have to handle the practical aspects involved when a unit is no longer occupied because the member has died.

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Handle Death of Member with Diplomacy and Efficiency

Sadly, a member in the planned community or condominium that you manage could die. If you and your staff have gotten to know the member or her family well, it could be especially upsetting. But as an association professional, you'll have to handle the practical aspects involved when a home or condo is no longer occupied for this reason. If this is the first time you'll be managing such a situation, you might not realize there's potential liability involved with the death of a member, and you should immediately contact the association's attorney when faced with this challenge. Here's what you need to know to handle the administrative tasks and avoid problems that could blow back on the association after you find out that a member has passed away.

Spring into Action After News

You should be ready to take the first steps after you've been informed that a member has passed away, but it's also important to handle such a situation diplomatically. "This is a delicate issue for most people, and the manager and board don't want to come across as cold or unfeeling," says Florida association attorney Ellen Hirsch de Haan. "However, the association does depend upon its assessments to pay the bills, and there is a practical problem, at least in the short term, when there is a disruption in the expected payments," she explains. So as soon as possible, you should:

Ensure security. Make sure the unit or home is locked up, and doors and windows are secured following a death. "Certainly this is necessary if the resident actually died in the unit or home and/or was removed from the unit or home by emergency medical responders," says de Haan.

Find responsible party. Check association records to see if there is a co-owner or someone who is listed as a contact. The manager would want to reach out for information on who will be responsible for the unit or home going forward. "Sometimes, the heirs will pay assessments and fees; other times, there may be no family, and so on,



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Death of a Member

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but there may be a family attorney, or other resource connected to the resident,” de Haan says.

Check status of assessment account. The unit or home is likely to become delinquent. The association does have the ability to proceed with collection against an estate even if you don’t know who is actually involved, though.

Warn board about interference. “People are curious about death, particularly if there is some mystery about it,” de Haan points out. Remind the board members not to go into the unit or home following a resident’s death. “It is particularly important, so that the heirs or family members cannot accuse the association of removing property from the unit or home following the death,” de Haan stresses.

Search for New Owner, Estate

You’ll also need to find out who the new owner of the home or condo unit is, or if it’s part of an estate. “If there is an estate, it will take a while for it to be opened and for additional information to be available, but eventually it will be possible to check the public court records to get information on the estate,” de Haan points out. Transfers of title are recorded in the County Public Records, which you can also search.

De Haan notes that, in a perfect world, the association would have an emergency contact person’s name. Going forward, make sure to add that to the list of information that should be obtained from every owner as part of the initial

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paperwork when a purchase is made. That way, the name is in the association's records for future reference, and to inquire about the status of the unit.

"In many communities, the neighbors or other friends within the association will have information about whether a resident has family, and they may be able to shed some light on what happens next," advises de Haan. Again, touch base with the association's attorney for guidance and assistance. She may be able to expedite a search for information or at least advise you about the best way to question other members for information.

Continue Collecting Amounts Owed

You may be unsure about how to approach the issue of collecting monthly maintenance, fees, assessments, etc. from the new owner or estate. While you might feel conflicted about asking for money so soon after someone had died, keep in mind that the association - while it's a great opportunity to create a social community - is also a business and your job is to help run it.

If you have an address for the family or heirs, use it for an informational notice regarding the assessments, advises de Haan. If title to the property has been conveyed, the name and address of the new owner will be on the recorded deed. At the least, notices should be mailed to the address of the unit or home and they will be forwarded if such arrangements have been made. Then, standard collections protocols can be followed, she adds.

It's possible that the member was delinquent or was violating the rules prior to her death. Expensive medical bills or an inability to physically maintain a property could've led to this. So how does this change your collection efforts? "If there was a violation at the time of death, it would depend on what that was," says de Haan, who suggests that managers check the governing documents to see whether the association has the ability to cure—that is, fix—the violation, and charge back the costs incurred to the home or unit. Your association's attorney will be able to help you determine the association's options.

Beware of Cracking Down on Successor

The deceased member might've left her unit to a family member or other person. But can you do anything to stop that person if she doesn't qualify financially to own the unit on her own, or is precluded from owning the unit for some other reason—for example, something about that person violates the governing documents? Tread carefully here. "Using finances as a criteria is a slippery slope to liability for the association," de Haan warns. She points out that the association always has the ability to foreclose later if the assessments are not paid. So ultimately, the association can collect in one way or another.

Many documents prohibit the association from refusing to recognize a new owner who has inherited a unit, or they exempt the heir from review or approval by the association. The United States Constitution prohibits any unreasonable restraints on the ownership of real property (the right of alienation of property), and, in most cases, the association would be limited to regulating occupancy rather than ownership.

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However, keep in mind that, ultimately, all sales and occupancy of units or homes are subject to the terms and conditions of the governing documents which run with the land. In Florida, violations of the documents prior to taking title is grounds for disapproval (unless the violation is cured prior to conveyance), says de Haan, who practices in Tampa. For example, if the documents prohibited trucks, the proposed owner would have to get rid of her truck before moving in. Because this area is rife with liability issues, check with the association's attorney to determine the association's rights there.

Notify Membership About Death

In addition to contemplating the business implications that the death of a member creates, think about the social side too. You should weigh whether or not you should notify the membership about the member's death. Generally, the best time to do this is at a board meeting, with a moment of silence, or some other acknowledgement of the resident, says de Haan. If the resident was active in the community, you should mention his contributions. And if you have any information on final arrangements, that can also be conveyed. If there is a newsletter for the community, list the death in the section on residents' news updates.

If there is a surviving spouse or significant other or family member in the home or unit, condolences from the association should be conveyed," de Haan adds. If there is a sunshine club and a surviving resident, a condolence card would also be appropriate.

Determine What to Do with Last Possessions

Under certain circumstances, you could be left with the responsibility for what to do with the deceased member's personal property. "It is a sad fact of life in the 21st century that too many people die alone and without family, or, the family wants nothing to do with the unit or home," de Haan reflects. That situation may leave the association in the position of having to foreclose on the unit or home, or deal with a bank foreclosure, though. If the association does get title, you and the board will have to deal with the resident's belongings.

Many of the deceased member's things can be donated to charity. Unfortunately, sometimes the heirs who couldn't be reached to help the resident when she was alive will suddenly appear after her death. Be especially careful about cleaning out a unit or home in that case. It's another good time to consult with the association's attorney for guidance, especially because you'll need to follow your state's laws regarding disposition of the "abandoned" contents of the home. ♦

Insider Source

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RECENT COURT RULINGS

► Board Members Were Liable Under Section 1983 Claim

Facts: A homeowner in a planned community sued an association and some of its board members, claiming that they violated her constitutional rights by prompting the police to harass her. Specifically, the homeowner claimed that the board members reported that her son was involved in something illegal and encouraged the police to arrest him. As a result, eight police officers came to her house, drawing their guns and threatening to come inside. The association and board members asked a trial court to dismiss the claims. They asserted that the homeowner hadn't shown that they were "acting under color of state law," a requirement for a 42 U.S.C. Section 1983 claim.

DECISION: A Kansas trial court refused to dismiss the claim.

REASONING: The trial court noted that the homeowner's claim was a Section 1983 claim. Section 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured..." The association and board members argued that they are private citizens, not state actors, such as police officers, so they could not be liable under Section 1983. They pointed to other cases where courts have determined that homeowners associations are not by themselves state actors.

The trial court noted, however, that where defendants are private citizens, they still can be held liable if it can be shown that they conspired with state actors, such as police officers, to deprive a person of civil rights. That is, "private persons jointly engaged with state officials in a situation, are acting 'under color' of law," said the trial court.

The trial court reviewed the case using a "joint action" test, which focuses on whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights. Under that "conspiracy" approach to a Section 1983 claim, state action may be found if a state actor has participated in or influenced the challenged decision or action. A private party who is involved in such a conspiracy may be liable under Section 1983, stressed the trial court.

While there is no joint action when private citizens have merely made complaints to police officers that resulted in arrests, courts have found state action when the private party was not a mere complainant, but possessed and exerted influence over the police, and conspired with them to have a person arrested and detained illegitimately.

In this case, the homeowner's evidence supported such a claim. One of the board members called the sheriff's office and urged officers to arrest the home-

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Recent Court Rulings

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owner's son at her house. Then, police responded to the board member's call by surrounding the house, drawing their guns, and banging on the doors and yelling for the homeowner's son to come out. The trial court said that, taken together, the homeowner's evidence could allow a reasonable jury to infer that the association and its board member conspired together to successfully exert influence over the police, and therefore should be treated as state actors under Section 1983.

- Farr v. Davis, August 2016

➤ Allegedly Fraudulent Condo Sales Didn't Excuse Assessment Nonpayment

FACTS: A condominium unit owner was obligated to pay a percentage of the condominium common area expenses. The condominium association sued the owner, seeking collection of unpaid condominium assessments. The owner claimed the association did not have the legal authority to require him to pay the assessments. He alleged that the condominium developer and real estate agents made misrepresentations and errors of omission, and as a result, the initial sale of units was a fraud. Based on this alleged fraud, the owner argued that the association didn't have legitimate governing documents that gave it the right to collect assessments.

A trial court ruled in favor of the association, which had submitted declarations and documents showing it had the authority to impose and collect assessments. The owner appealed.

DECISION: A Washington appeals court upheld the trial court's ruling.

REASONING: On appeal, the owner continued to assert that the association didn't have the authority to seek payment of the condominium assessments because it lacked legal authority because of fraudulent sales of residential units by the condominium developer. But the owner presented no evidence to support this claim, said the appeals court.

The appeals court emphasized that it was undisputed that the association had the authority to impose assessments. It stressed that the declaration "grants authority to the condominium board of directors to determine the common and specially allocated expenses paid by the residential association and its members through monthly assessments." Additionally, the association submitted declarations and exhibits showing the board approved and the owners ratified assessments every year since its inception, and evidence that the owner had attended these yearly meetings. ♦

- 2200 Residential Assn. v. Grace, July 2016

Q&A

Determining Proper Party to Be Liable for Common Area Accident

Q An elevator repair person injured himself while working on one of the elevators in the common area of the condo building I manage. He's threatening to sue our board of managers, as well as the company that previously owned the building before it was recorded as a condominium, and 200 individual unit owners. What are some factors that could determine which defendant is held liable for the accident?

A Control is one of the key factors in a case where a worker suffers an injury at a property. The crux of a recent New York case that's similar to yours was whether the board of managers or another entity or individual unit owners—or all three groups—were liable. Here's how the court made its decision.

Control Is Key Element

A New York trial court decided that the company that originally owned a condo building and the individual unit owners were off the hook for an injury suffered by a worker who fell from a scaffold in the boiler room that was a common element of the condominium building. Rather, the board of managers was liable because it “exercised exclusive control” over the building's common elements and it contracted for the renovations wherein the worker's incident occurred, determined the court.

A limited liability company had acquired the building by a deed recorded several years earlier. Several months after the deed was recorded, the company made the building subject to the Condominium Act by executing and filing a declaration of condominium. The declaration defines the common elements of the condominium to include the building's boiler room. This meant that, as a common element of the condominium, the boiler room was, at the time of the worker's accident, owned collectively by all of the owners of the building's 130 units. However, the conversion of the building to a condominium placed its common elements “solely under the control of the condominium's board of managers” pursuant to the Condominium Act, which “recognizes that the board exercises exclusive control over the common elements,” said the court.

“In keeping with the vesting of exclusive control of a condominium's common elements in the board of managers, it is well established that a claim arising from the condition or operation of the common elements does not lie against the owners of the individual units,” said the court. Nor should a condo conversion-sponsoring entity that did not own or control the premises where the accident occurred be liable. “The proper defendant on such a claim is the board of managers,” the court held.

The court noted that in past decisions, it had held that a statute imposing obligations or liabilities upon the “owner” of real property does not give rise to a claim

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against the owners of individual condominium units where the claim arises from the common elements or concerns a duty not connected with any individual unit. “Here, it is the board of managers, not the company or individual unit owners, that entered into the contract for the lobby renovation project in the course of which the worker was injured,” said the court.

Party That Retains Power Stays on Hook

The company still retained ownership of some units in the building, but the court didn’t feel that the continued ownership of certain units at the time of the accident would affect its entitlement to dismissal from the lawsuit. “It is true that each unit owner—including the sponsor of the condominium conversion, to the extent it retains ownership of unsold units—owns an undivided fractional interest in the real property comprising the condominium’s common elements, however, our precedents make clear that a unit owner’s ownership interest in the condominium’s common elements does not give rise to liability, whether for common-law negligence or under the Labor Law, because the condominium declaration transfers complete and exclusive control of the common elements to the board of managers,” said the court.

In essence, the unit owners, though they collectively own the common elements, are divested of the powers and responsibilities of ownership with respect to those elements. Those powers and responsibilities are vested in the board of managers, which becomes the proper defendant on any claim, whether common law or statutory, that lies against the owner of the common elements, the court concluded [Jerdonek v. 41 W. 72 LLC, July 2016]. ♦

RISK MANAGEMENT**Help Member Enforce Restraining Order in Community**

Sadly, domestic violence incidents have become a regular presence on the news. And, chances are, a member in your community has experienced domestic violence, threats of violence, stalking, or harassment of some sort. As a manager, you have many roles; keeping residents safe is within your purview. You might’ve taken all of the steps you think you need to protect community members: installing a security system or cameras of some sort, maintaining landscaping that makes it difficult for would-be assailants to hide, and enforcing a curfew in situations that called for one. But protecting a member—and the other home or condo unit owners nearby—from domestic violence or related crimes is a much different risk that you must manage. Here’s what you need to know.

Follow Clear-Cut Rules

While the safety of the particular resident at risk is key, domestic violence can affect community harmony as well. Neighboring members may complain and

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say that the association has the power, and maybe even the duty, to provide for the health, safety, and welfare of its members who live in close proximity with residents whose behavior becomes violent in this way. The problem? Your association is not as well equipped as trained law enforcement to deal with these domestic violence situations as they happen.

But what if a domestic violence victim asks for your help in enforcing a restraining order, also known as an “order of protection,” which is issued by a court ordering an individual to stay away from the victim who has the restraining order against him or her? Fortunately, if the member has taken legal steps to obtain a restraining order against an individual, the rules are fairly clear. And a court issues these orders only to people who can show that someone has been violent with them or threatened violence, so you don’t have to exercise your own judgment or feelings.

Be very aware that if a member shows you a restraining order, it puts you on notice that the member is in danger. Your community may have security safeguards such as patrols or cameras, but the member’s act of showing you the restraining order could mean the association has an additional responsibility to do something to help prevent an attack. Ask your association’s attorney about your duties to the victim and all residents in this situation, and take these six steps when a member shows you a restraining order and asks for your help:

Step #1: Get copy of restraining order. The first thing to do when a member tells you he or she has a restraining order is ask to see the order. Then make a photocopy of the order. Keep the copy in the member’s file so you’ll know where to find it in case you later need to show it to the police.

Step #2: Verify that order is genuine. Make sure that the restraining order is genuine. It should be signed and dated by a judge. Most orders have a court seal, but some don’t. In either case, call the phone number of the court, to make sure the order is valid. Give the clerk the case number listed on the order and confirm the name of the case and the names of the potential victim and the spouse or partner. Also, show the order to your association’s attorney for confirmation of its validity and advice on what it means.

Unfortunately, a member might try to use a fabricated restraining order for some purpose that isn’t legitimate. As a representative of the association, you would not want to take action based on a fake restraining order against a law-abiding member. Also, check for an expiration date. Orders typically expire after a set period—for example, six months after the date issued. The police won’t be able to arrest the individual for violating the order if the order has expired.

If you discover that the order is no longer in effect, advise the member to contact the police and the court if she continues to feel threatened.

Step #3: Ask member for photograph and description of individual. Ask the member for a photograph of the individual. Make copies and distribute them to your employees. Also get a detailed description. This will help your staff identify the individual if the member doesn’t have a photo. And even if there is a photo, you will need additional information. Get the age of that person and a descrip-

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tion, including height, weight, hair color, eye color, and any distinguishing features that the prohibited person may have, such as scars or tattoos.

Step #4: Alert building staff. When a member shows you a restraining order and you have verified that it is authentic, tell security staff, maintenance staff, and other on-site employees what is going on. Tell them to be on the lookout for the individual and what to do if they spot him or her. You can adapt our *Model Letter: Keep Staff in Loop When Member is in Danger*, to alert your building staff.

Step #5: Call police if individual shows up. If you or your employee sees the individual on or around the property, call 911. When the police arrive, show them a copy of the restraining order.

The police can decide how far the order goes and what action to take. If you simply tell them about the order, the police will be relying on your interpretation of it, and you might be wrong. Giving the police the order puts the matter in their more experienced hands.

If the date on the restraining order has expired, contact the member to ask if she has gotten a new order. If she has not, ask her if she intends to do so and tell her to show you the new order as soon as she gets it. ♦

MODEL LETTER

Keep Staff in Loop When Member Is in Danger

Ask your association's attorney to help you adapt this letter to give to on-site employees in your community when a member shows you a valid restraining order against an individual.

ATTENTION ALL EMPLOYEES

FROM: **Manager, ABC Condominiums**

RE: **VERY IMPORTANT—RESTRAINING ORDER**

A member in our community has obtained a restraining order against an individual. A restraining order is issued by a court when the court finds that one person poses a threat to another person. It orders the potentially dangerous person to stay away from the other one. In granting the member's request for a restraining order, the court ruled that this individual threatened her safety. A photograph of the individual is attached to this letter. A physical description appears below. If you see this individual anywhere in or around our community, immediately call the police by dialing 911. Also, warn the member by calling her at the numbers listed below. Show the police a copy of the restraining order when they come in response to your call. We keep a copy of the order in the member's file. The order expires on [insert date, e.g., Dec. 31, 2016]. Please carefully read the following information and study the photograph. If you see this person in or around the community after this date, contact the member immediately to check whether she has gotten a new order.

MEMBER: JANE DOE, UNIT 3A

Tel. #: 123-456-7890 **Cell #:** 111-987-5321

OFFENDER: John Doe, age 35

DESCRIPTION: Approximately 6 ft., 3 in., 200 lbs, brown hair, blue eyes, scar on left cheek